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IN THE

Supreme Court of the United States

October Term, 1945

No. 517

D. A. SCHULTE, INC.,
Petitioner,

against

SALVATORE GANGI, suing on behalf of himself and other employees similarly situated,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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The briefs of the respondents and the Wage and Hour Administrator, as *amicus curiae*, both seek to fill the gap in the record on the question of coverage by resorting to a theory that the mere proof of location of petitioner's building in the garment district of New York City brought the building *per se* within the Fair Labor Standards Act.

This theory is an attempted extension of the scope of the opinion of this Court in *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U. S. 88. The theory is nothing more or less than that the Act is applicable to all employers in any industry affecting interstate commerce. As pointed

out by this Court in *Kirschbaum* v. *Walling*, 316 U. S. 517, 522, such coverage by industrial classification was rejected by Congress in framing the Act:

> "The history of the legislation leaves no doubt that Congress chose not to enter areas which it might have occupied. As passed by the House, the bill applied to employers 'engaged in commerce in any industry affecting commerce.' See H. Rep. No. 2182, 75th Cong. 3 Sess. p. 2; 83 Cong. Rec. 7749, 7750. But the bill recommended by the conference applied only to employees 'engaged in commerce or in the production of goods for commerce.' H. Rep. No. 2738, 75th Cong. 3rd Sess. pp. 29, 30; 83 Cong. Rec. 9158, 9266, 9267."

See also *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 570, and *Higgins* v. *Carr Brothers Co.*, 317 U. S. 572, 574.

The Administrator himself heretofore has disclaimed such coverage by industrial classification.

In Interpretative Bulletin No. 1 released by the Wage and Hour Administrator October 12, 1938, shortly before the Act became effective, the Administrator stated that the Act "does not confer upon the Administrator any general power to issue rulings including industries within the coverage of the Act, or excluding them." After recounting that Congress had rejected a proposal putting employees within the Act on an industrial basis, the Administrator continued: "Under the Act, employments are included or excluded by the terms of the statute itself as interpreted by the courts, and not by the force of any administrative action." The release further stated: "It is noted that the coverage as described in sections 6 and 7 does not deal in a blanket way with industries as a whole. Thus, in section 6, it is provided that every employer shall pay the statutory minimum wage to 'each of his employees

who is engaged in commerce or in the production of goods for commerce.' It thus becomes an individual matter as to the nature of the employment of the particular employee. *Some employers in a given industry may not be subject to the Act at all; other employers in the industry may be subject to the Act in respect to some of their employees, and not others; still other employers in the industry may be subject to the Act in respect to all their employees, except those specifically exempted by the later provisions of Section 13-a.*" (Italics supplied.)

Aside from the weaknesses in the analogy between the garment industry of New York City and the oil-well interstate pipe-line industry of Texas dealt with in *Warren-Bradshaw Drilling Co.* v. *Hall, supra*, petitioner here; the mere lessor of the contractor-tenants who worked for local manufacturers, is one important step further removed from the alleged stream of interstate garments than was the driller in the *Bradshaw* case from the stream of interstate oil.

The question of coverage, as all of the parties agree, not only is one that will be decisive in itself should this Court find lack of proof of coverage, but also is of the utmost importance in the question of whether or not there was such a *bona fide* dispute as brings the facts here squarely within the question expressly reserved by this Court from the holding of *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, that a release of liquidated damages under the Act is invalid in the absence of a *bona fide* dispute.

As to the question of the validity of the releases here, the briefs of the respondents and of the Administrator take different positions.

Respondents' brief, which makes no denial that there was a *bona fide* dispute, argues that (Resp. brief, p. 12):

> "While it is true that this Court in *Brooklyn Savings Bank* v. *O'Neil* found as a fact that there was no

bona fide dispute between the parties therein as to coverage or amount, yet the same public policy considerations which found that the release therein was invalid would dictate that a release obtained as a result of a settlement of a *bona fide* dispute between the parties with respect to coverage would be invalid."

The Administrator's brief, on the other hand, does not argue that a release given in settlement of a *bona fide* dispute is invalid but takes the position that there was no *bona fide* dispute here. Moreover, as we read the Administrator's brief, he argues that there could not have been a *bona fide* dispute (Gov. brief, pp. 20-21), because of the decision of this Court in *Warren-Bradshaw Drilling Co.* v. *Hall, supra,* rendered November 9, 1942, *subsequent* to the delivery of the releases by the respondents here.

The fallacies of such an argument are: (1) the question as to the *bona fides* of the dispute depends for its answer upon the minds of the parties at the time of the dispute and nothing not then available, such as a decision not then handed down, could have entered the minds of the parties or shed light upon the controversy that was compromised and settled prior to the decision; (2) the decision in *Warren-Bradshaw Drilling Co.* v. *Hall, supra,* has no application to the facts as to coverage in the instant case and would not have resolved the question in dispute between the parties even had they had clairvoyant powers and been able to foresee with certainty what this Court was going to hold several weeks thereafter; and (3) even if this Court, contrary to the decisive distinction between the facts at bar and those in the *Bradshaw* case that is respectfully urged by petitioner, should conclude that the question of coverage here is determined by the *Bradshaw* case, surely the question would not be regarded as so free from reasonable doubt that the parties could not in entire good faith have disagreed as to such applicability of the *Bradshaw* case even if they had been gifted with clairvoyant powers.

Without a reversal of the Administrator's recent and considered declaration as to the public policy underlying the Act, he could not now support respondents' contention that the releases would be invalid even if delivered after a *bona fide* dispute.

This question of public policy is discussed in the brief of the Administrator as *amicus curiae* submitted to this Court in *Brooklyn Savings Bank* v. *O'Neil*, *supra*, where he says (Govt. brief in *Brooklyn Savings Bank* v. *O'Neil*, p. 20):

> "The factors which we have mentioned suggest, to us, the difficulty and perhaps the inadvisability from the standpoint of the policy of the Act of framing a sweeping generalization that all releases of liquidated damages are either valid or invalid."

In the same brief the Administrator explains why it would do more harm than afford protection to employees to place them, to use the phrase of the Chief Justice in his dissenting opinion in the *Brooklyn Savings Bank* case "so far in tutelage as not to be free to give" a release even where there is a *bona fide* dispute and the employee receives the full wages prescribed by the Act. That brief of the Administrator in the *Brooklyn Savings Bank* case also explains that "the Department of Justice is a party to settlements in which the employees do not receive full liquidated damages" (p. 19). These settlements, it is pointed out, are entered into by the War and Navy Departments with the employees of cost-plus contractors after investigations by the Administrator as to liability under the Act. The brief adds (pp. 19-20):

> "If it is decided by the contracting agency, the Administrator, or on appeal by the Assistant Attorney General, that the employee should prevail, the United States Attorney handling the case is directed to negotiate a tentative settlement with the em-

ployee's counsel for submission to the contracting agency for acceptance or rejection. The wages due are of course always paid, but the claim for liquidated damages is the subject of bargaining, and almost invariably the employee's counsel is willing to accept considerably less than the total amount of liquidated damages. After payment of the amount agreed on, a judgment is entered dismissing the suit with prejudice, thereby preventing the employee from seeking to recover more on the same claim."

The entire argument of the Administrator in the *Brooklyn Savings Bank* case takes for granted that a release of liquidated damages freely and fairly delivered in settlement of a *bona fide* dispute upon full payment of the wages due under Sections 6 and 7 of the Act is valid (p. 12, footnote 10, and p. 21).*

And none of the cases cited by respondents for the proposition that the Act prohibits a release of liquidated damages upon the settlement of a *bona fide* dispute, involved the settlement of a *bona fide* dispute between an employer and employee with respect to coverage under the Act.

One of the grounds upon which certiorari was prayed herein was the conflict between the decision of the Circuit Court of Appeals in the instant case and the decision to the contrary effect of the Circuit Court of Appeals for the Fifth Circuit in *Atlantic Co.* v. *Broughton*, 146 Fed. (2d) 480 (C. C. A. 5) (Petition for Certiorari, p. 17). In that case the Court said (p. 482):

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* The discussion by Dodd in *Administration of Workmen's Compensation*, p. 186 *et seq.*, referred to in the Circuit Court of Appeals opinion, R. 325, and also referred to in footnote 10 of the Administrator's brief herein (p. 20), has no applicability to the instant case, because in none of the workmen's compensation acts of the various States is there a provision similar to Section 16 (b) of the Fair Labor Standards Act for the payment of liquidated damages.

"Though created by statute, the liability to pay liquidated damages is no different from any other ordinary obligation to pay a sum of money. It is in the nature of a Congressional estimate of the damages resulting to an employee from a wrongful withholding of any part of his wages or overtime compensation. As such, it is a proper subject of accord and satisfaction.

"If, as cross-appellees contend, the payments in settlement were made under such circumstances as would create an agreement of accord and satisfaction, the claim for liquidated damages upon the amounts given in settlement was extinguished."

Respectfully submitted,

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